

8
No. 622

Office - Supreme Court, U. S.
FILED

NOV 23 1945

CHARLES EDMUND GROPLEY
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM 1945

MATTIE BRADEY, as Administratrix of the Estate of
Marion Thomas Bradey, deceased,
Petitioner,
against

UNITED STATES OF AMERICA, as represented by
War Shipping Administration,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT, AND BRIEF IN
SUPPORT THEREOF.**

SIMONE N. GAZAN,
Proctor for Petitioner,
One Broadway,
New York City.

INDEX

	PAGE
Petition	1
Statement of the Case	2
The Litigation	3
Jurisdiction	4
Opinion Below	4
Errors Below	5
The Questions Presented	9
Reasons Relied on for Granting Writ	11
Certificate	12
Brief in Support of Petition	13
POINT ONE—A merchant vessel, manned and operated by civilian officers and crew, does not become public vessel because carrying war materiel for Army	13
POINT Two—Public Law 17, which preserves merchant seamen status to crews employed by W. S. A., does not bar a suit by navy personnel because the government has provided naval pensions	18
POINT THREE—There is no public policy of the United States which prevents navy crewman from suing a vessel, not his own, for damages resulting from negligence	21
POINT FOUR—A right of action exists in favor of navy personnel against United States, engaged in business, for tort committed by another vessel	22
POINT FIVE—The Death Statute of Virginia created a new and original cause of action in favor of parents of deceased naval crewmen which may be enforced notwithstanding the availability of navy pensions to such parents	27

	PAGE
POINT SIX—That the United States created a pension system for naval forces, which parents of a deceased navy crewman may collect, does not bar a suit by such parents under a state death Act providing for the recovery of elements of damages personal unto parents	29
Conclusion	31

TABLE OF CASES

Anderson v. Hygeia Hotel, 92 Va. 687	28
Atlantic Greyhound v. Keesee, 111 Fed. (2d) 657	28
Brady v. United States, 1945 A. M. C. 777	4, 16, 17
Canadian Aviation v. United States, 65 S. Ct. 639	12
Christman v. United States, 61 Fed. (2d) 673	31
Crawford v. Hite, 176 Va. 69	28
Culberson, The, 61 Fed. (2d) 195	24
Cunnien v. Superior Iron Works, 175 Wis. 172	30
Dahn v. Davis, 258 U. S. 421	10, 25
Dobson v. United States, 27 Fed. (2d) 807	17, 19, 21, 23
Fed. Housing Admr. v. Burr, 309 U. S. 242	22
Fed. Land Bank v. Priddy, 295 U. S. 229	22, 26
Geary v. Metro. Ry., 73 App. Div. 441	30
Lassell v. City of Gloversville, 217 App. Div. 323	31
Lassell v. Mellon, 220 N. Y. Supp. 235	31
Lingren v. Fleet Corp., 55 Fed. (2d) 117	26
Lomicka v. United States, 2 F. Supp. 766	31
Matthews v. Warner, Admr., 70 Vt. 570	29
Militano v. United States, 55 F. Supp. 904	23
New England Co. v. United States, 55 Fed. (2d) 674	23
Norman Bridge, The, 290 Fed. 575	18
O'Neal v. United States, 11 Fed. (2d) 869	23

PAGE

Partridge v. United Elastic Corp., 288 Mass. 138	29
Porello v. United States, 53 F. Supp. 569	23
Ratcliff v. McDonald, 123 Va. 781	28
Reconstruction Finance v. Menihan, 312 U. S. 81	22
Shea v. Rettie, 287 Mass. 454	30
Sloan Shipyard v. Fleet Corp., 258 U. S. 549	22
U. S. S. B. v. Harwood, 281 U. S. 519	22
United States v. City of New York, 8 Fed. (2d) 270	18
Virginia Iron Co. v. Odle's Admr., 128 Va. 280	28
Western Maid, The, 257 U. S. 419	16
Wooten v. United States, 1931 A. M. C. 1997	24

STATUTES

50 U. S. C. A. App. 1291 (Public Law 17)	19, 21, 33
46 U. S. C. A. 1113-1118 (W. S. A.)	26

MISCELLANEOUS

Opinion of Attorney General, 1944 A. M. C. 595	9, 26
Senate Committee on Commerce, Report of	9, 19, 26
U. S. Code Congressional Service, 1243, pp. 2-12	9
Robinson on Admiralty, p. 276	22

IN THE
Supreme Court of the United States
OCTOBER TERM 1945

MATTIE BRADEY, as administratrix of
Marion Thomas Bradey, deceased,
Petitioner,
against

UNITED STATES OF AMERICA, as represented by
War Shipping Administration,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.**

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE UNITED
STATES:

Mattie Bradey, as Administratrix of the Estate of Marion Thomas Bradey, deceased, respectfully prays a writ of certiorari to review the final judgment of the United States Circuit Court of Appeals for the Second Circuit, entered on the 2nd day of November, 1945, affirming a decree against Petitioner which dismissed her libel.

The decedent was a navy crewman on the United States destroyer "Parrott" and he was killed when his vessel met in collision with the Liberty ship "John Morton", a merchant vessel.

The decision complained of was upon the ground that, since the United States had established a pension system for the benefit of disabled naval personnel, or, in case

of death, for the surviving dependents, there was no right of action against the War Shipping Administration to recover damages.

This decision has not yet been officially reported.

Statement of the Case

The steamship "John Morton", a Liberty ship, was operated by Luckenbach Steamship Company, as general agent for War Shipping Administration.

This vessel was manned, equipped and supplied by the said agent for the account of War Shipping Administration. She was manned by a civilian crew of merchant seamen and this vessel was classified by the government as a merchant vessel.

She had been allocated to serve the army in transporting war material to Europe, and at the time of the collision, hereinafter described, she had loaded coal for the armed forces and was proceeding to take on additional army cargo when the collision occurred.

Notwithstanding her assignment to serve the army, she remained in the possession, custody and control of the general agent; continued to be manned by her civilian officers and crew; her berthing, loading, ballast and navigation remained in the hands of her civilian personnel.

The destroyer "Parrott" was a vessel of war on which Marion Thomas Bradey and John D. Goeller, Jr., were navy firemen.

The destroyer was at her pier in Norfolk, head in, which put her at right angles to the channel of Norfolk harbor.

The steamship "John Morton" was proceeding out of port, on right side of the channel, which put the destroyer "Parrott" on her right or starboard.

As the "John Morton" was nearing a point about opposite the pier where the "Parrott" was, the "Parrott" started backing out from the pier and continued to back toward the channel, and toward the "John Morton".

These two vessels collided and Marion Thomas Bradey and John D. Goeller, Jr. were killed.

The personal representatives of these men brought libels *in personam* against the United States, as represented by the War Shipping Administration, to recover damages for the surviving parents under the death statute of Virginia, which statute was duly pleaded.

That statute is not a mere re-enactment of the Lord Campbell's Act providing for a survival of any cause of action which the deceased might have had, as erroneously found by the Circuit Court of Appeals. True, it created a right of action to recover damages for death, but it was not a survival statute. The elements of damage were not confined to pecuniary loss, but allowed recovery for the loss of the companionship and comfort of their son; for the grief suffered by reason of the son's untimely death; heartaches and anguish which the parents suffered in thinking of the pain and torture endured by the son when he received his fatal injuries.

This statute created a new and original cause of action in the parents and was not the survival of a right of action which might otherwise have died with the deceased. It was born at the moment of death. It was expressly made applicable to maritime torts.

The Litigation

The Respondent excepted to the libel upon the grounds that,

(a) The deceased having been a seaman on a United States war vessel, and the other ship involved being

owned by the United States, and, because carrying war material, was a public vessel, therefore there was no right enforceable under either the Suits in Admiralty Act or the Public Vessels Act, as the United States had not consented to be sued in respect of such claim;

(b) Since deceased was a navy crewman on a war vessel, his dependents were entitled to federal pensions and because of that it was against the public policy of the United States to pay both pensions and damages.

The District Court sustained ground (b) and dismissed the libel because it held that it was against public policy to entertain such suit.

Bradey v. United States, 1945 A. M. C. 777.

An appeal was taken to the Circuit Court of Appeals which considered all grounds of error assigned, and affirmed the District Court.

Petitioner now seeks certiorari to review that decision.

Jurisdiction

The jurisdiction of this court to entertain this Petition, and to grant the same, is provided by section 347 of Title 28, of the United States Code.

Opinion Below

The opinion of the Circuit Court of Appeals, by a unanimous bench, held that,

a. It was against the public policy of the United States to permit naval personnel to sue for damages inflicted by a vessel not his own, since the government provides pension benefits, and there cannot be a collection of pensions and also damages flowing from the same cause.

- b. The steamship "John Morton", a merchant ship, manned, operated and navigated by civilians, became a public vessel from the mere fact that she had been allocated to carry war material for the Army, and that under the Public Vessels Act there was no right in the parents of a deceased navy crewman to sue a public vessel for damages.
- c. The Death Statute of Virginia, sued upon, created no right of action enforceable by such parents as against the United States, since the pension law provided the exclusive benefits.
- d. That the Virginia Death Statute was akin to the Lord Campbell's Act, overlooking the fact that the statute created a new and original cause of action, with new elements of damages recoverable and not based upon pecuniary loss or dependency.
- e. Because Public Law 17 kept merchant seamen, employed by the War Shipping Administration, in the category of private employees so as to retain all existing rights of merchant seamen, and so as not to be considered civil employees of the United States and thereby come under the Federal Employees' Compensation Act; that implicit in that law there was an intention by Congress that federal employees could not get both damages and compensation.

Errors Below

The Circuit Court of Appeals entirely lost sight of the following facts:

- a. The suit was predicated upon a state statute of Virginia which gave surviving parents a right to recover damages for elements which come into being coincident with the death, such as the loss of the comfort and society of their son; *their* suffering arising out of the pain and

anguish *endured by their son*, and other sentimental elements.

b. The death having occurred in the harbor of Norfolk, no federal statute applied because the Death on the High Seas Act had no application and there is no right of action for death under the general admiralty law. The cause of action was created and governed solely by state statute.

e. Public Law 17, which saved to merchant seamen employed by the War Shipping Administration, their independent status as private employees, does not justify the conclusion reached by the Circuit Court of Appeals that "Congress regards the two remedies (damages or compensation) as mutually exclusive". We seek to enforce not a right created by Congress but a right created by the State of Virginia, and we are not seeking benefits from either of two federal laws, or under any federal law.

d. The Virginia Death Statute is something more than a re-enactment of the Lord Campbell's Act, as the Circuit Court thought. It is entirely new. It provides for elements of damages to parents regardless of pecuniary loss or dependency. It creates an original right of action and is not a mere survival statute. The parents had the right to sue to recover those elements of damages notwithstanding any pension benefits, to which they were entitled in any event.

e. Employees of the United States are not excluded from the rights provided by the Public Vessels Act. It may be against the public policy of the United States for a navy crewman to sue for damages inflicted by *his own vessel*, but there is no law or public policy which would deny such navy crewman the right to sue *some other vessel* which may have negligently inflicted the injury.

f. The steamship "John Morton" was not, at the time of the collision, a "public vessel", and the Circuit Court of Appeals overlooked the fact that, although allocated to carry war material, she was manned by a civilian crew; operated by a private corporation as agent; navigated by civilian officers and that civilians had charge of her berthing, ballasting and loading. She was a merchant ship; custody and control being retained by civilian operators.

g. Even if the steamship "John Morton" be deemed to have been a "public vessel", the Petitioner was entitled to sue under Public Vessels Act, and the Circuit Court of Appeals overlooked the facts which differentiated this instant case from the *Dobson* case (27 Fed. (2d) 807). In the *Dobson* case the navy crewman sought to recover against the owner of *his own ship*, a submarine, for negligent navigation. Petitioner here is suing the owner of *the other ship*, not the destroyer on which decedent had served.

h. There is no present public policy which discourages suits against the United States for tort. Fact is, by consistent legislation, the United States has put itself in the category of a private steamship company, subject to suit under the same circumstances as would a private owner, except that the suit must be in admiralty.

The United States is liable, under the Jones Act, for negligence.

The United States is liable, under general maritime law, for unseaworthiness.

The United States is liable, under Death on High Seas Act, for death.

The United States is liable, under state death statutes, for death within the territorial waters of the state.

There is now pending in Congress a Bill (H. R. 181) known as Federal Tort Claims Act which, if enacted, will

permit suits in the federal district courts to collect damages for torts committed by "employees of any federal agency, members of the military or naval forces of the United States".

That Bill further indicates the policy of Congress to practically do away with sovereign immunity as a defense to damage suits.

The *Dobson* case is not authority for dismissing the libel.

i. The Circuit Court of Appeals failed to recognize the duality of character of the United States as a sovereign and again as a business concern, engaged in private shipping enterprises.

The United States, as a sovereign, owns its naval vessels. The United States, as a shipping concern, owns the fleet of Liberty ships and other cargo vessels, which is operated by War Shipping Administrator, as a business distinct from the performance of purely governmental functions, like maintaining a navy.

There has always been this separation of activities. The old Shipping Board; the Fleet Corporation and the Maritime Commission, were each suable as if a private concern, and the War Shipping Administrator is merely their successor, subject to suit as if an independent entity.

The Petitioner seeks to sue this business or commercial enterprise, the War Shipping Administration, as disassociated from the sovereign United States, performing purely governmental functions.

That such dual character exists and was recognized, appears not only from decisions of this and other courts, but from various legislative and official sources.

The War Shipping Administration, as successor to The Maritime Commission, acquired "all the general and implied powers of a business corporation".

Opinion of the Attorney General, 1944 A. M. C.
at page 595. 46 U. S. C. A. 1113-1118.

"In the exercise of its various functions and in the conduct of its activities, the War Shipping Administration in general is authorized to operate with the powers of a business or commercial organization under the provisions of the Merchant Marine Act, 1936 * * *. Additional flexibility is obtained through the Suits in Admiralty Act which furnishes authority for the settlement or compromise by the Administrator of claims arising out of the operation of the merchant or public vessels under his control."

Report of Senate Committee on Commerce, (Senate Report No. 62, Feb. 22, 1943);
No. 1 United States Code Congressional Service,
1943, at page 2-12.

The Questions Presented

1. Does the fact that a merchant vessel, manned by a civilian crew, and operated and navigated by a private steamship corporation, which retains actual custody and control of the ship, become a public vessel merely because she has been allocated to carry war material for the Army?
2. Does Public Law 17 evidence any public policy of the United States against navy crewmen suing to recover damages for third party negligence, albeit the third party is the War Shipping Administration, because of the existence of federal pension laws?
3. Does the fact that the United States, as a sovereign, employs crews for its navy, and also, as a separate and distinct activity, through the War Shipping Administration, operates merchant vessels, manned by civilian seamen, prevent a suit by such navy crewmen against the

War Shipping Administration, to recover damages negligently inflicted by the merchant vessel?

4. Whether naval personnel on a war vessel, injured or killed by the negligence of another vessel, operated by the War Shipping Administration, a business enterprise of the United States, have the right to sue for damages for tort notwithstanding such naval crewmen are entitled to federal pensions?

5. When the death of a navy crewman occurs within the territorial limits of a state, and occasioned by the negligence of a vessel, not his own, and the laws of such state create a liability for damages other than pecuniary loss to dependents, can the parents of such deceased crewman bring suit under that state law against the United States, as represented by the War Shipping Administration, notwithstanding the parents may be entitled to federal pensions?

6. Does the mere fact that the United States as sovereign, has established a pension system for its military personnel and surviving dependents, estop or bar the parents of a deceased navy crewman from suing the business branch of the United States, under a state death statute, for the special elements of damage authorized thereunder, and personal unto the parents, where the death was caused by the negligence of another vessel?

The foregoing involve important questions of federal law, wrongly decided by the Circuit Court of Appeals, which have not been decided but which should be settled by this Court.

The decision of the Circuit Court of Appeals is upon a federal question in a way probably in conflict with an applicable decision of this Court, to-wit, *Dahn v. Davis, Agent*, 258 U. S. 421, wherein this Court held that an employee of the United States Post Office, as railway mail clerk, could sue the Director General of Railroads, a federal agency, for negligence.

The questions presented are of general public interest, affecting large elements of our citizens and as to which there should be an authoritative pronouncement.

Reasons Relied on for Granting the Writ

A decision on these questions is vitally needed because many cases, in behalf of naval personnel injured in the line of duty, are now pending against the United States, arising out of negligent operation of merchant vessels. For instance:

The right of gun crews on Liberty ships, injured by the negligence of the merchant seamen or officers, to recover damages, has been challenged because, as navy employees, they are entitled to disability pensions.

The right of army base carpenters, who are civil employees of the United States, but who work on Liberty ships shoring cargo, and injured through the negligence or unseaworthiness of the merchant vessel, operated by the U. S. A., to recover damages, has been challenged because, as civil employees, they are entitled to federal employees' compensation.

There was a collision between a United States navy vessel and a British freight steamer. One navy man lost a leg and an eye; another was mangled in the pelvic region and will be a cripple for life. Both vessels were at fault. The British vessel is ready to pay its share of the damages but the United States claims that, because these men are entitled to federal pensions, it cannot be made to contribute to the damages for the injury, unless the men will waive, or risk losing, their pension rights.

The Army operates a ferry service between Brooklyn and Staten Island Army Base to transport carpenters and other workmen, all civil employees of the United States, to their place of work. This ferry is a public vessel. On

one occasion this ferry negligently crossed the bow of a Norwegian vessel, was struck, and two men were killed and several injured. The government has taken the position that, since its civil employees come under its Compensation Act, no damages can be collected for the tort.

Government counsel are also claiming that the Public Vessels Act does not allow recovery for injuries or death, notwithstanding the decision of this Court in *Canadian Aviator v. United States*, 65 S. Ct. 639.

These, and numerous kindred situations, require a decision by this court which will finally settle the question of pensions as a bar to civil liability for negligence, and particularly in the instant case, whether the Virginia death statute affords a right in parents as against the pension provisions.

Other reasons why the writ should be granted are found in the errors of law in the decision complained of, and hereinbefore set out.

Petitioner prays that the writ of certiorari be granted.

Dated, New York, N. Y.,
November 20th, 1945.

Respectfully submitted,

SIMONE N. GAZAN,
Attorney for Petitioner.

Certificate

I hereby certify that I have examined the foregoing Petition, and in my opinion it is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

SIMONE N. GAZAN.